IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1997 of 2003
with
CIVIL APPLICATION NO. 7080 OF 2003

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

I.T.BRAINS

Versus

RITZ NET

Appearance:
MRS KETTY A MEHTA for appellants/applicants
MR NM KAPADIA for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 08/10/2003

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

Admit. Learned Counsel Mr.N.M.Kapadia waives service of notice on behalf of the respondent.

2. With the consent of learned Counsel for the parties, this appeal is finally heard today.

3. The appellants have filed this appeal under Section 96 of the Code of Civil Procedure challenging the judgment and decree passed in Summary Suit No.10 of 2003 dated 25th September 2003 and the order dated 25th September 2003 passed below application Exh.25 in the said suit, whereby the learned 3rd Jt. Civil Judge (SD) stayed the judgment and decree to enable the appellants to approach this Court, by giving security for Rs.9,00,000/-.

4. The respondent (original plaintiff) filed Summary Suit No.10 of 2003 against the appellants wherein it has applied for summons for judgment at Exh.11. In the said proceedings, the appellants also filed an application at Exh.13 for leave to defend. The learned trial Judge rejected the said application Exh.13 on 25th September 2003.

5. As per the case of the respondent - plaintiff, the defendant No.1 is a partnership firm and defendants Nos.2 to 4 are the partners of the said firm. It is alleged that the defendants have stated before the plaintiff that they have acquired rights to provide Inter-net services at Surat and they offered dealership right to the plaintiff with a condition to deposit Rs.8 lacs to the defendants. The defendants also agreed to give interest at the rate of 9% per annum on the deposit amount. The plaintiff accepted the said offer and deposited Rs.8 lacs with the defendant. According to the plaintiff, instead of providing the said connection and structure for the same, the defendants failed to perform the said obligation and when the plaintiff asked back the deposit amount, the defendants gave only Rs.30,000/- to the plaintiff, the plaintiff filed the suit to recover an amount of Rs.7,70,000/- with interest at the rate of 9% per annum from the defendants under the provisions of Order 37 of the Code of Civil Procedure.

6. Summons were issued to the defendants under the prescribed form to appear before the Court within 10 days after the service of summons. It appears that there was some controversy as to the date of service of the summons

to the partners of the defendant firm. Be that as it may, the defendants appeared before the Court on 2nd April 2003. The learned trial Judge, it appears, observed that the defendants failed to appear within 10 days from the service of the summons. In that view of the matter, the plaintiff prayed for judgment under the provisions of Rule 3(4) of Order 37 of the Code of Civil Procedure, vide Exh.11. As stated above, the defendants also filed an application at Exh.13 for leave to defend, by contending that the summons for judgment was not duly served upon the defendant No.1 partnership firm. Many contentions were raised in the application for leave to defend. The learned trial Judge, after hearing the parties, passed the decree in the sum of Rs.8,97,050/at the rate of 9% per annum in favour of the plaintiff.

7. After hearing learned Counsel Ms.Ketty Mehta appearing for the appellants and learned Counsel Mr.Kapadia appearing for the respondent, we are of the opinion that the learned trial Judge appears to have decided the suit with great haste. From the arguments advanced before us, we do find that there is real defence with regard to the transaction between the parties, as according to the defendants, the transaction was in the nature of premium, against the claim of the plaintiff, namely, it is a deposit. In any case, the defence raised by the defendants cannot be construed as a sham defence. As held by the Supreme Court in the case of M/s.Sunil Enterprises and anr. v. SBI Commercial and International Bank Ltd., reported in AIR 1998 SC 2317, the trial Court is required to consider at the stage of grant of leave to defend is whether there is a real or sham defence and whether the facts alleged by the appellants if established would be a good defence, and the trial Court should not go into the question whether the facts alleged are true or not, as that situation would arise only after the leave was granted and at the trial. In view of this, we are of the opinion that the matter requires a remand to the trial Court for the purpose of deciding it on merits and in accordance with law.

At the request of learned Counsel appearing for the parties, we are not deciding the contentions raised in the appeal. However, we do observe that contentions raised in the appeal are good defence and the same are required to be tried during the trial.

In the above view of the matter, we allow this appeal by setting aside the judgment and decree passed by the learned 3rd Jt.Civil Judge, (SD), Surat, dated 25t

September 2003 and we grant the application for leave to defend filed by the appellants on condition that the appellants shall deposit the sum of Rs.9,00,000/- within eight weeks from today. On such amount being deposited, the respondent - plaintiff will be allowed to withdraw 50% (fifty percent) of the said amount on its furnishing security to the satisfaction of the trial Court with a further condition that in case the respondent loses in the suit, the said amount shall be returned to the appellants with interest at the rate of 9% per annum. The balance amount of the 50% (fifty percent) shall be invested by the trial Court in any Nationalised Bank in the name of the Nazir of the Court for a period of five years to be renewed from time to time till the suit is heard and disposed of.

The appeal is allowed accordingly and the matter is remanded to the trial Court for a decision afresh in accordance with law. There shall be no order as to costs.

In view of the order passed in the main appeal, no order is required to be passed in the Civil Application for stay and it stands disposed of.

(Kshitij R. Vyas, J.)

(Akshay H. Mehta, J.)
Sreeram.